

Book Review

*Inside the Mason Court Revolution:
The High Court of Australia Transformed*

Jason L. Pierce

Carolina Academic Press

This is a remarkable book. Jason Pierce has done what no other academic in law or political science in Australia has done until now. He has written a book on Australia's High Court whose interpretations and conclusions have been founded principally upon extensive qualitative interviewing of the highest echelons of the Australian judiciary. In so doing, he has written what amounts to an 'insider account' of the development of the Australian judiciary, and of relevant Australian law, over the past 20 years or so. The result is a fascinating book that will underpin similar inquiry in law and politics for many years to come.

Dr Pierce, an American academic, interviewed judges from all of Australia's highest Courts. His interview program was ambitious and what is both surprising and gratifying is that his ambition was fulfilled. In the period from 1997-2003, the author spoke with more than eighty members of the judiciary. The interviewees came from the High Court, the Federal Court, State Supreme Courts and members of the Bar appearing regularly before the High Court. The outcome of these discussions is a text in which judges' voices are heard expressing their visions for the Australian judiciary, their attitudes to the art of judging, their misgivings about the operation of the principal institutions of government, their doubts and concerns about the direction of their Courts, and even occasionally their reservations about their colleagues.

This is eye-opening in the best sense of the term. One comes away from reading this book with a heightened perception and understanding not just of how the High Court has changed during the period, but also of how judges think about and perceive themselves and their role. It is an original, and very important, contribution to our knowledge of how one of most important democratic institutions operates in practice and how, and why, it changes direction from time to time.

The author's focus is upon the transformation of the High Court of Australia that occurred under the stewardship of Chief Justice Anthony Mason from the mid-1980s to the mid 1990s. He describes the change as a revolution. This may be a touch overstating matters - even under Mason the High Court was quite conservative when looked at in comparative perspective - but nevertheless during that time the Court moved in a much more liberal direction. Dr Pierce makes his aim to explain why this significant shift occurred.

He maps the changes that occurred in six different dimensions: attitudes to the purposes of law, appellate litigation, politics, legal reasoning, precedent and the law's development. Consistently with the nature and purposes of qualitative inquiry, Dr Pierce maintains that the categories emerged from the interview data: As he puts it:

“...this six-dimension categorization was not constructed prior to the interviews; rather, it emerged organically from the data. In other words, I did not impose the dimensions or labels. Many came directly from the judges...these dimensions best represent how appellate judges thought about the orthodox and politicized judicial roles.”

Having developed the framework, the author suggests that the transformation may best be described as having been constituted by six significant shifts, one in each dimension.

So, he proposes that there was a movement in the Mason era from a preoccupation with legal certainty to a greater concern with the achievement of justice and fairness. Rather than focus on the incremental development of existing legal rules, the Court sought to articulate the fundamental principles which underlay different areas of legal discourse. It became a significantly more public player in the politico-legal disputations of the time, sometimes seemingly moving out in front of the parliament where the law had been neglected by it to the detriment of the rights and interests of citizens. The Court became more willing to declare openly the enduring community values which underlay its concern with the achievement of justice rather than cloaking value driven debate beneath a technical concern with legal method. Reflecting its concern with underlying principle, the Court was more prepared than had been the case previously, to overturn precedents even when these had been established for many decades. The judges, finally, appeared ready to move from being the passive recipients of legal argument to becoming far more active participants in the process of legal change and development.

What then provoked this metamorphosis? Through his respondents, Dr Pierce concludes that no one factor is sufficient to explain what occurred and why. Instead, a complex combination of forces, individual, institutional and political, joined to create the decade long process of change.

Clearly, the composition of the Court was crucial. Partly as the result of a number of new appointments to the Court by successive Labor governments, a clear majority of the Court was inclined to perceive their roles and tasks in new and different terms. Paradoxically, however, the reforms were shaped principally by judges, including Chief Justice Mason himself, who had been appointed by Conservative governments.

Institutional factors also played their part. Significant alterations in the Court's composition were effected as the outcome of a new constitutional provision mandating judges' retirement at the age of 70. New statutory provisions providing for special leave to appeal to the High Court meant that the Court could exercise significantly greater control in choosing which cases it heard. The abolition of Privy Council appeals, Dr Pierce surmises, provided new, psychological leeway for the Court to move in new, and particularly Australian, legal directions.

Politically, the Court took on legal issues which the other branches of government had left aside. The principal example here was Court's willingness to overturn centuries of precedent and previous understanding in declaring the

indigenous peoples of Australia possessed native title to land. It so happened that a number of critical cases, having significant political ramifications, fell to the Court for decision the relevant period and the Court chose to decide rather than avoid them for fear of political criticism and backlash.

As the author makes clear, however, in a concluding chapter, the Mason 'revolution', despite its attractiveness to significant numbers of judges and academic commentators, did not outlive its progenitor. Under the present Chief Justice Murray Gleeson, the Court has returned in many aspects, to a more orthodox and less creative vision of its jurisprudential role. In extensive quotations from judicial supporters and detractors, we are given splendid insights into why, exactly, the Mason period was so vibrant and yet so fundamentally contested.

Not content to leave the reader with just the riches of his qualitatively founded discoveries, Dr Pierce includes an appendix in which he describes his research methodology with rigour, perceptiveness and candour. It should be compulsory reading for anyone inclined to follow in his footsteps and pursue research of a similar kind in Australia. Qualitatively founded legal research has been notably absent in this country, and it is to be hoped that this book will encourage more of it.

It remains only to say that as one who has done similar work in other countries, that I am most admiring of this contribution. It is, I think, the most important book written on the politics of the Australian judiciary in at least the last twenty years.

I wish I had written it.

Spencer Zifcak